

1 MICHAEL A. JACOBS (CA SBN 111664)
2 MJacobs@mofo.com
3 ARTURO J. GONZÁLEZ (CA SBN 121490)
4 AGonzalez@mofo.com
5 MORRISON & FOERSTER LLP
6 425 Market Street
7 San Francisco, California 94105-2482
8 Tel: 415.268.7000 / Fax: 415.268.7522

9 KAREN L. DUNN (*Pro Hac Vice*)
10 kdunn@bsfllp.com
11 HAMISH P. M. HUME
12 hhume@bsfllp.com
13 BOIES SCHILLER FLEXNER LLP
14 1401 New York Avenue, N.W.
15 Washington, D.C. 20005
16 Tel: 202.237.2727 / Fax: 202.237.6131

17 WILLIAM CARMODY (*Pro Hac Vice*)
18 bcarmody@susmangodfrey.com
19 SUSMAN GODFREY LLP
20 1301 Avenue of the Americas, 32nd Floor
21 New York, NY 10019-6023
22 Tel.: 212.336.8330 / Fax.: 212.336.8340

23 Attorneys for Defendants
24 UBER TECHNOLOGIES, INC. and OTTOMOTTO LLC

25 NEEL CHATTERJEE (SBN 173985)
26 nchatterjee@goodwinlaw.com
27 GOODWIN PROCTER LLP
28 135 Commonwealth Drive
Menlo Park, California 94025
Tel.: 650.752.3100 / Fax.: 650.853.1038

29 Attorneys for Defendant OTTO TRUCKING LLC

30 UNITED STATES DISTRICT COURT
31 NORTHERN DISTRICT OF CALIFORNIA
32 SAN FRANCISCO DIVISION

33 WAYMO LLC,

34 Plaintiff,

35 v.

36 UBER TECHNOLOGIES, INC.,
37 OTTOMOTTO LLC; OTTO TRUCKING LLC,

38 Defendants.

39 Case No. 3:17-cv-00939-WHA

40 **DEFENDANTS' OPPOSITION TO
41 WAYMO'S MOTION IN LIMINE NO.
42 13 TO EXCLUDE ALLEGATIONS
43 THAT DAVID DRUMMOND ACTED
44 IMPROPERLY**

45 Judge: The Honorable William Alsup
46 Trial Date: October 10, 2017

47 **UNREDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**

1 Waymo does not challenge the admissibility of evidence that (1) Google joined Uber's
2 Board of Directors without informing Uber that it had already decided to enter the transportation
3 as-a-service ("TaaS") market; (2) Uber learned of Google's advancements in TaaS from public
4 sources rather than Google; and (3) each time Uber asked about Google's plans to compete with
5 Uber, Google failed to give a straight answer, deferring on the grounds that "competition is a long
6 way off" and the companies should "continue to work on [their] partnership." Goodman Decl.,
7 Ex. 53 (Drummond Dep.) at 24:23-25:7.) All the while Google knew that it did not plan to
8 partner with Uber and was already strategizing about

10 Instead of challenging the admissibility of this evidence, Waymo only seeks to preclude
11 Uber from suggesting that Google acted improperly. (Mot. at 1.) There is ample evidence for
12 Uber to argue to the jury, and for the jury to conclude, that Waymo acted in bad faith by
13 misleading Uber about its plans, including when directly asked by Uber, and that its motives for
14 doing so were to gain a competitive advantage over a company it secretly viewed as its main
15 rival. This evidence is relevant to Waymo’s motives for bringing this case and thus relevant to
16 both Waymo’s claims and Uber’s defenses. (See Defendants’ Opp. to Mot. *In Limine* 15;
17 Defendants’ Opp. to Waymo’s Mot. for Partial Summary Judgment.)

ARGUMENT

19 No later than February 2013, Google decided that the best way to commercialize its
20 autonomous vehicle program was to enter the TaaS market. Goodman Decl., Ex. 54 (Epstein
21 Dep.) at 31:15-36:3.) But Google did not disclose this strategy to Uber when it made a
22 substantial investment in Uber in 2013, nor when, as a result of that investment, it placed its Chief
23 Legal Officer, David Drummond, on Uber’s Board of Directors. Instead, Uber first learned about
24 Google’s plans when Google co-founder Sergey Brin publicly suggested the possibility in May
25 2014 at a tech conference. (*Id.*, Ex. 53 at 17:14-20:7.) When confronted by Uber’s then-CEO
26 Travis Kalanick, Drummond told him not to worry, that “we were still deciding what we were
27 going to do” and “any competition was a long ways off, and we had a good partnership, we
28 should continue it.” *Id.*

1 Despite Drummond’s assurances to the contrary, Google continued making advances
 2 toward launching a competing TaaS platform. For example, on January 15, 2015, Kalanick
 3 emailed Drummond after learning that the head of Google’s [REDACTED]
 4 [REDACTED] at the Detroit Auto
 5 Show. (Goodman Decl., Ex. 45.) A few months later, Kalanick learned, again from third parties,
 6 that Google was [REDACTED] (*Id.*,
 7 Ex. 33.) Again, Drummond assured Kalanick that “competition would be a long ways off and we
 8 should continue to work on our partnership.” (*Id.*, Ex. 53 at 22:2-24:7.) By this time, however,
 9 Google had already decided internally *not* to partner with Uber and instead compete with it. (*Id.*,
 10 Ex. 31, Ex. 32.) In fact, at the same time these statements were made, Google was performing an
 11 internal analysis of [REDACTED] (*Id.*,
 12 Ex. 47.)

13 Even when Drummond eventually resigned from Uber’s Board, he was not fully candid.
 14 He never told Uber about Google’s concerns about potential misconduct on the part of
 15 Levandowski and other Otto employees even though he was simultaneously ordering Google’s
 16 investigative team to redouble their investigative efforts, wholly motivated by the merger between
 17 Otto and Uber. (*Id.*, Ex. 41, Ex. 53 at 54:9-57:24.)

18 In trade secret cases, a plaintiff’s motivation for filing suit is relevant and admissible to
 19 witness credibility, a plaintiff’s bad faith, damages, and several defenses. *See* Defendants’ Opp.
 20 to Mot. *In Limine* 15 (citing caselaw). And Judge Corley already held Waymo’s motives are
 21 relevant. Dkt. 832 at 4. Google’s course of conduct while occupying a seat on Uber’s Board, and
 22 its deliberate withholding of information from Uber in particular, is relevant to the jury’s
 23 evaluation of Google’s motivation for filing suit and the credibility of its witnesses. Waymo’s
 24 motion entirely fails to address this aspect of its relevance, which courts in the Ninth Circuit have
 25 held outweighs any prejudice that might accompany such evidence in trade secrets cases.
 26 (Defendants’ Opp. to Mot. *In Limine* No. 15.) Google’s conduct is also relevant to Defendants’
 27 failure to mitigate damages defenses, which are premised in part on the failure to timely inform
 28 Uber of Google’s concerns about Levandowski’s conduct or seek judicial intervention.

1 (Defendants' Opp. to Waymo's Mot. for Partial Summ. J. at 15-17.) Google's conduct towards
 2 Uber during Drummond's Board tenure is relevant to the credibility of Waymo's *ex post*
 3 justifications for both its failure to inform Uber and its delay in filing suit.

4 Waymo's arguments under Rule 403 are also wrong. For example, Waymo's first Rule
 5 403 argument is that whether Google acted "improperly" is "irrelevant" and "untrue." The
 6 relevance and supporting evidence is discussed at length above and Google is free to challenge
 7 Uber's evidence and argument with its own witnesses and evidence. When it comes to prejudice,
 8 Waymo claims that such evidence and argument would "sully[] Mr. Drummond, Waymo, and
 9 Alphabet." (Mot. at 4.) As to "sullying," all evidence that is unfavorable for a party tends to
 10 prejudice it to some extent. *E.g., U.S. v. Blitz*, 151 F.3d 1002, 1008 (9th Cir. 1998). To be
 11 excluded under Rule 403, however, the prejudice must both be "unfair" and substantially
 12 outweigh its probative value. Waymo has not demonstrated how evidence that Google withheld
 13 information from Uber while occupying a seat on its Board is "unfairly prejudicial." Just because
 14 evidence "hurts Waymo" is not "a good enough reason to exclude it." 7/26 Hr'g Tr. at 61:12-14.

15 Waymo also suggests that argument about Drummond's Board tenure would "confuse"
 16 the jury, citing *Nationwide Trans. Finance v. Cass Info. Sys.*, 523 F.3d 1051, 1063 (9th Cir.
 17 2008). But in *Nationwide*, the Ninth Circuit affirmed a district court ruling that a party cannot
 18 present evidence about an agency theory of liability where the district court held that no agency
 19 relationship existed. Presenting the jury with an invalid theory of liability could have confused
 20 the jury about the bases on which it could find liability. *Id.* Here, Uber has asserted no claims
 21 and it will not argue that Drummond or Google has any type of liability to Uber. The jury will
 22 not be confused that this evidence relates to some undisclosed claim against Drummond. To the
 23 contrary, they will wonder, like any other objective observer, why Drummond, then an Uber
 24 Board member, did not pick up the phone and call Kalanick to warn him that Uber had just
 25 entered into a merger agreement with a company whose employees Google was investigating for
 26 possible employment agreement breaches and trade secret misappropriation. These deficiencies
 27 in Waymo's story are directly relevant to its claims and Uber's defenses.

28

CONCLUSION

For the foregoing reasons, Waymo's Motion *In Limine* 13 should be denied.

Dated: September 13, 2017

MORRISON & FOERSTER LLP
BOIES SCHILLER FLEXNER LLP
SUSMAN GODFREY LLP

By: /s/ Karen L. Dunn
KAREN L. DUNN

Attorneys for Defendants
UBER TECHNOLOGIES, INC. and
OTTOMOTTO LLC

GOODWIN PROCTER LLP

By: /s/ Neel Chatterjee
NEEL CHATTERJEE

Attorneys for Defendant
OTTO TRUCKING LLC

ATTESTATION OF E-FILED SIGNATURE

19 I, Karen L. Dunn, am the ECF User whose ID and password are being used to file this
20 Motion *in Limine*. In compliance with General Order 45, X.B., I hereby attest that Neel
21 Chatterjee has concurred in this filing.

/s/ Katen L. Dunn
Karen L. Dunn